



FIVE YEARS OF RANDOM TESTING SHOWS EARLY ADR SUCCESSFUL

By Kent Snapp

The RAND Report may have concluded that there is "no strong statistical support" for the idea that federal court-connected alternative dispute resolution programs in fact saved time and money in the resolution of civil cases in the Civil Justice Reform Act (CJRA) pilot and comparison districts it studied.

But our experience in the U.S. District Court for the Western District of Missouri — a CJRA demonstration district — provides strong statistical and practical support for the proposition: ADR has brought about case termination at a 28 percent faster rate than traditional litigation — often without the need for discovery — and has saved parties more than \$16 million from May 1994 through December 1996.

In short, our program shows just how successful a program can be in bringing efficiency to federal dockets, and in reducing transaction costs to the parties. For this reason, our program was favorably reported upon by the Federal Judicial Center.

Design Centers on Goals

The CJRA was directed at a concern that civil litigation was too expensive and prolonged, but left it to the local district courts to fashion their own remedies.

In the Western District of Missouri, the court convened its judges and a Civil Justice Advisory Group to identify the issues and develop a plan for an ADR system that would reduce the costs of litigation by encouraging earlier settlements.

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Its early thinking was critical to our program's current success. Because most cases settle shortly before trial, the court believed ADR should be used to encourage earlier settlement. This was consistent with the advisory group's belief that a relatively current docket does not solve the problem of excessive transaction costs for the parties — and that delay per se was not a problem in the Western District.

Therefore, in designing the Early Assessment Program, both groups wanted a process that would prompt earlier settlements by requiring earlier face-to-face meetings of the parties to

- consider other methods of resolving the dispute.

They ultimately designed a program that distributes civil cases by even and random assignment into three different categories: cases in which the parties are required to use our ADR program ("A" cases), cases in which the parties may choose to use the program ("B" cases), and cases that are ineligible for the program ("C" cases).

The mandatory and optional ADR formats begin with an "early assessment meeting" with the administrator of the program, which is to be held

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confront the reality of the case, assess the strengths and weaknesses of both sides and consider realistic costs of further litigation.

They thought this goal could be achieved if the ADR program encouraged trial attorneys and parties early in the case to:

- confront the facts and issues before engaging in expensive and time-consuming discovery procedures;
- engage in early discussion of the issues;
- consider the views of the opposing sides;
- consider the projected costs of future procedures in an effort to settle the case before costs and lawyers' fees have made settlement more difficult; and

within 30 days after the initial responsive pleadings. It must be attended by parties with settlement authority, as well as the attorneys primarily responsible for handling the case at trial.

The general purpose of the meeting is for the parties to decide which path they want to take to resolve their dispute, and to start taking the first steps down that path — although many cases settle at that first meeting.

The parties may choose a private neutral (from an approved list or with approval by the administrator) and the ADR process (mediation, non-binding arbitration, early neutral evaluation, magistrate settlement conference, etc.).

On the other hand, the parties may choose to stay within the public system, and select the administrator of

the Early Assessment Program to mediate the dispute. This option is the overwhelming favorite of the parties, who have selected it in approximately 96.7 percent of the cases in the last five years. The attorneys and the parties prefer mediation in the courthouse and prefer not paying for the mediator.

Early Communication Essential

Another major purpose of the early assessment meeting is to open friendly communications between the parties. After all, many lawsuits are filed because effective communication has ceased or cannot be initiated without a lawsuit.

As the administrator, I try to start all early assessment meetings on a friendly basis. I request that participants use my first name, and lay out ground rules intended to make the process both effective and confidence-inspiring. (See "Kent Snapp's General Instructions" below.)

To facilitate communication, I allow a few questions of "the other side," as long as they are about facts necessary to evaluate the case. I also sometimes ask a few questions to get from generalities to specific facts.

After the parties meet together, I meet with each side in private caucus. When I ask how I can help, the lawyers often repeat their strong points and avoid talking about possible weak points. In private caucus I want each side to acknowledge the problems with their case. If they are reluctant, I often point out what their problems could be. My purpose is to get both sides to be realistic, understand their risks and to focus on the issues.

If the parties want to use me to start negotiations, I ask the plaintiff for an offer that I can use to get a response from the defendant. Often it takes two or three meetings with each side (during the session) to get offers that are on the outer range of realistic. Because case evaluation is so difficult, parties often don't know where to start and begin with extreme positions.

Movement of the offers during the negotiation often leads to success. Parties who seem sure I can't help often settle when the other side shows

some realism and some movement. If the parties say they are at an impasse, I test both sides and often suggest a solution. Settlement always requires meeting some of the needs of both sides.

When a case doesn't settle at the first meeting, I try to determine what needs to be done to create a better chance for success later. Sometimes the parties do not understand the issues and need to re-evaluate. Sometimes some specific discovery is required. Sometimes the clients need time to change their positions.

If necessary, I schedule a second early assessment meeting and make some specific private suggestions to each side. If it looks like I can't help, I ask each attorney to call me on a date certain for a re-evaluation.

Numbers Tell Story

Our program has now been in place for civil cases filed in our district since Jan. 1, 1992. We now have five years of case data and experience on a total of 3,308 cases, which show benefits beyond time and cost savings.

The numbers tell quite a story:

- 73 percent more "C" cases (control group) than "A" cases (mandatory) went to trial, suggesting that professional ADR really does help facilitate settlement;
- while the *median* savings per case is \$10,000, based on attorney estimates, the *average* savings is \$36,215 (assuming two sides per

case);

- a survey of attorneys who have participated in the program found that 83 percent of respondents felt it was somewhat or very helpful in moving the dispute toward resolution, and that 94 percent of the attorneys said they would volunteer an appropriate case for the program; and
- an independent Federal Judicial Center evaluation found, among other things, that the district judges believe the program is effective in producing earlier settlements, enhancing attorney satisfaction and reducing judicial workload.

Attorneys often do not know when a case will settle, and therefore often volunteer for ADR late in the process, after substantial transaction costs have been incurred. We have not found that any kind of case is better suited for ADR. Rather, we do our best work with the cases that have the best lawyers and reasonable clients.

This article has demonstrated just some of the benefits of a federal court-connected ADR program that emphasizes early communications with lawyers and clients, meeting in a neutral and dignified environment, to discuss realistically the relative strengths and weaknesses of their respective cases. Clearly, these benefits, and the cost savings of moving the civil docket 28 percent faster, show that ADR is a good investment of a court's financial resources.

Kent Snapp's General Instructions for Early Assessment Meetings

1. All participants are to listen carefully, be polite and avoid arguments and posturing
2. Each side is to be allowed to state their version of the facts
3. A meeting goal is to separate agreed-upon facts from controverted facts
4. Direct participation by the parties is encouraged
5. Legal discussion should be limited to unusual legal points
6. After meeting together, the administrator should meet with each side in private caucus
7. All confidential information conveyed in private caucus is to be kept confidential
8. The administrator lets the parties know they can choose another mediator, or another ADR process if they feel that could help resolve the dispute — and helps parties select and implement any such preference
9. Early problem-solving is encouraged, including settlement of the case